IN THE UNITED STATES SUPREME COURT

SPRING TERM
CASE NO. 83-1586

GRINNELL MUTUAL REINSURANCE COMPANY,
AN IOWA CORPORATION,

PETITIONER,

vs.

EMPIRE FIRE & MARINE INSURANCE COMPANY,
A NEBRASKA CORPORATION, ET AL,

RESPONDENTS.

= =

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

= =

PETITIONER'S REPLY BRIEF

= =

Lowell A. O'Grady
O'GRADY, MORLEY & MORLEY, LTD.
P. O. Box 239
Grand Forks, ND 58206-0239
(701)772-7266
Attorneys for Petitioner

April 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-1586

In The
SUPREME COURT OF THE UNITED STATES
Spring Term, 1984

Grinnell Mutual Reinsurance Company, an Iowa Corporation,
Petitioner,

-vs-

Empire Fire & Marine Insurance Company, a Nebraska Corporation, et al,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS REPLY BRIEF

STATEMENT OF CASE

Respondents' state that this Petitioner does not challenge the Eighth Circuit's determination that the policy language makes its coverage primary and Excalibur's excess. (Respondents' brief, page 4). This statement is not correct. (See Petitioner's brief, page ii, issue II and pages 9 and 10). This is an important issue that is hotly disputed and has been in dispute throughout the litigation.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION OF TRANSAMERICA FREIGHT SYSTEMS, INC. V BRADA MILLER FREIGHT SYSTEMS, INC., 423 U.S. 28.

Respondents Riechmann and Excalibur argue the Eighth Circuit's Decision that a public carrier's statutory duty to the public, under ICC regulations, is secondary to a primary duty that can be superimposed by the law of a state is correct. By implication they argue the Eighth Circuit was correct when it used Illinois common law to find that driver Culver was the employee of Hamel, the owner, and Hamel were primarily responsible to the public, not Riechmann, the common carrier and lessee of the transport driver Culver was operating. (See Respondents' brief at 6 and the Eighth Circuit's Decision 722 F2d 1400, 1405).

The Eighth Circuit's Decision is in direct conflict with this court's decision of Transamerica Freight Lines, Inc., 423 U.S. 28. Justice Blackmun in his opinion at pp. 35-36 states that while leasing is permitted, the primary control of the leased transport under ICC regulations is with the common carrier lessee, not the owner. It is the lessee who owes the primary duty to the public.

It can be readily seen that if the Eighth Circuit's decision is allowed to stand, it does in effect overrule this court's Brada Miller decision. It would return the entire interstate trucking industry to the many problems prior to Brada Miller, supra, as outlined by Justice Blackmun at 423 U.S. 37 of his opinion. Indeed, this case assumes national importance and the need for a writ can readily be seen.

II.

THE EIGHTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE SUBSTANTIVE LAW OF ILLINOIS AND ONE OF ITS OWN PRIOR DECISIONS.

Respondents Riechmann and Excalibur argue that we asserted in our petition that the Eighth Circuit's Decision was in conflict with Decisions of other circuits. (See Respondents' brief at page 6).

Respondents are in error. We argued that the Eighth Circuit's Decision was in conflict with this court's Brada Miller decision, supra, and two Illinois cases: Schedler v Rowley Interstate Transp. Co., 368 NE2d 128 (Ill. 1977) and Krieder Truck Service, Inc. v Augustine, 304 NE2d 1179 (Ill. 1979) and the Eighth Circuit's own prior decision of Wellman v Liberty Mutual Insurance Co., 496 F2d 131 (8th Cir. 1974). (See Petitioner's brief at page 8).

In Krieder, supra, the Supreme Court of Illinois held in compliance with Brada Miller that so long as the ICC lease was in effect (as was true in our case), it would follow Schedler, supra, and troublesome agency and independent contractor questions need not be determined and that court held the interstate carrier liable to the public because the ICC lease was in effect. The Eighth Circuit, in its Decision, entirely either overlooked or ignored this Decision. The Circuit applied Illinois common law despite these two Illinois Decisions.

Again, this case assumes national importance in the sense that it returns the interstate trucking industry to all the difficulties that it encountered prior to Brada Miller, supra.

III.

THE EIGHTH CIRCUIT'S DECISION NEGATING THE PETITIONER'S EXCLUSIONARY CLAUSE IS IN DIRECT CONFLICT WITH ILLINOIS LAW AND IN CONFLICT WITH ERIE V TOMPKINS.

Riechmann and Excalibur argue the Eighth Circuit's Decision is correct and cites two Decisions: a 1971 South Carolina Federal District Court and a 1977 Minnesota Supreme Court decision.

In an almost identical fact question to this case in St. Paul Fire & Marine Ins. Co. v Frankurt, 69 Ill. 2d 209, 370, NE2d 1058, 1061, 1062, that court held where an ICC lease existed that a rental exclusion very similar to the exclusion in the Petitioner's policy was valid even though the transport was empty and driven by the owner on the owner's business when the accident occurred.

Again, this case is in direct conflict with this court's Erie R. Co. v Tompkins, 304 U.S. 64 (1937). If the Eighth Circuit's Decision is allowed to stand, it will impose federal common-law where the law of Illinois should prevail. It will create confusion and uncertainty throughout the insurance industry.

CONCLUSION

This case is one of national importance because:

First, the Eighth Circuit's Decision is in conflict with this court's Transamerica Freight Systems, Inc., supra, on the basic and vital issue of control over a transport used in interstate commerce;

Second, the Decision is in direct conflict with the substantive law of Illinois on control over a transport engaged in interstate commerce;

Third, the Decision is in direct conflict with the substantive law of Illinois on the rental exclusion contained in the petitioner's policy and, hence, violates this court's Erie R. Co. v Tompkins Decision.

Respectfully submitted,

Lowell A. O'Grady
212 South 4th Street
P.O. Box 239
Grand Forks, ND 58206
Counsel for Grinnell